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C O M M U N I T I E S S A F E R

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In 2004, the Appellate Court ruled in *Doe v. Pataki*, that a residual pool of approximately 9,000 sex offenders had not been afforded the opportunity to challenge the ratings of their Sex Offender Registration Act level. Each of these sex offenders was notified that he or she had the right to request a hearing for the purpose of modifying (presumably, lowering) his or her level. Currently, the criminal courts of New York are hearing thousands of cases in which sex offenders are asking for a re-evaluation of their level of risk of reoffending. (The Appellate Court ruled that the New York Risk Appraisal Guide (NYRAG), which is currently being used in the courts across New York State, even though critics have raised serious questions about the adequacy of this measure.) Currently, judges across the state are struggling with cases in which they are asked to assess risk of sexual recidivism.

In 1994, the Jacob Wetterling Crimes against Children and Sexually Violent Offender Act spawned nationwide efforts to develop post-adjudication registration procedures for convicted sex offenders. The subsequent 1996 Megan's Law required states to establish sex offender community notification mechanisms, the purpose of which was to make information about sex offenders living in the community available to relevant parties in an effort to maximize public safety. The states were given considerable leeway in establishing procedures and guidelines for determining sex offender notification policies. The New York Sex Offender Registration Act (SORA) of 1995 was set forth to establish a sound and effective process for establishing sex offender community notification policies within the state of New York. In New York, a sex offender can be determined to be at one of three

levels of risk to the community. Their identified levels of risk (low, moderate or high) correspond with a notification level of 1, 2 or 3, respectively. In most cases, the Board of Examiners of Sex Offenders makes a recommendation to the court regarding a sex offender's level of risk and threat of harm. The court then makes the ultimate leveling determination. The determined notification level dictates the extent and scope of community notification regarding a sex offender.

The New York Sex Offender Registration Act also mandated the Board of Examiners of Sex Offenders to design guidelines and processes to be utilized to determine both an individual's risk for sexual re-offense and to identify the potential harm he (or she) may pose to the community. The New York Sex Offender Risk Assessment Guidelines and Commentary (NY RAG) dated November of 1997 represents the actualization of this directive. Not unlike risk assessment methods and processes established in other states within the context of sex offender registration and notification laws, the NY RAG functions as the means by which a registered sex offender's risk for sexual offense recidivism is identified, and the scope of notification of his or her presence in a given community is subsequently determined. A pivotal tool in the New York sex offender leveling and notification process, the guidelines appear to represent a good faith effort on the part of the Board of Examiners of Sex Offenders to create an informed method for identifying sexual offense recidivism. However, more than an informed method should be required in making these critical distinctions regarding a sex offender's risk for sexual re-offense, and there are concerns relative to the construction and content of the NY RAG that should be raised and addressed.

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Doe v. Pataki: continued from cover article

According to the Risk Assessment Guidelines and Commentary (1997), the NY RAG is identified as “an objective assessment instrument” with the goal of capturing both future risk of sexual offense recidivism and harm. It is derived from the guidelines developed earlier by the State of New Jersey in its enactment of Megan’s Law. In the development of the NY RAG, along with mandated considerations, factors associated with sexual re-offense recidivism were gleaned from the literature and input was provided by an array of individuals associated with the sex offender field. Numerical values were assigned to the fifteen factors identified, with risk being determined by calculating the total points an individual acquired, (i.e. 70 points or less=Level I; 71-109=Level 2; and, above 110= Level 3). However, this somewhat informal process falls seriously short of the procedure required to establish a reliable and valid objective assessment tool.

An objective measure has well-defined and fixed scoring procedures. The NY RAG has mandated override criteria and allows for departure from the procedure “if special circumstances warrant” (p.4). The mandated individualized approach purported in the guidelines to allow for the exercise of independent judgment and expertise merely serves to further erode the objectivity of the NY RAG. In the formal construction of a measure, the purpose of the measure must be clearly specified. The NY RAG purports two purposes, to identify the risk of a repeat sexual offense and to identify the level of threat an individual poses to public safety. The terms “recidivism” and “threat” are two key constructs that do not appear to have been either operationally defined in the guidelines or investigated relative to their construct validity. For example, by sexual recidivism do the guidelines mean an additional accusation, a re-arrest or a re-conviction? What about plea bargains? Over what time frame is re-offense considered? And what precisely is meant by the term “threat”? Whereas the term ‘re-offense’ is found often in the empirical literature, usually to connote a second conviction, there is little reference to the term ‘threat.’ Perhaps this is because there is no professional consensus regarding the degree of harm caused by different offenses. Is one hurt more by being the victim of an exhibitionist or by being the victim of a voyeur? Is forced oral sexual contact inherently more or less harmful than forced penile penetration? Of course, degree of harm to the victim must be assessed on a case by case basis. However, there does not appear to be empirical support for making generalizations about the degree of harm caused by different sexual acts, except in the most general terms, and certainly no empirical support for quantifying the degree of harm caused by various types of sexual offenses. Finally, are the two constructs of ‘recidivism’ and ‘threat’ overlapping or mutually exclusive and how does the NY RAG capture either (or both) of these distinctions or commonalities?

In the formal construction of an assessment tool, determining its reliability and validity is essential to the viability of a given measure. Neither the reliability of the NY RAG, (the degree of consistency of the measure), nor its validity (the degree to which it accurately measures what it is suppose to measure, i.e. recidivism and threat) appears to have been scientifically examined or substantiated. While the appendix to the guidelines indicates that the NY RAG was tested

“against a large sample of cases to insure that accurate results were produced,” it is not at all clear what procedures were used or what is meant by “accurate results.” Does it mean that the measure accurately predicted that those identified as Level 3’s demonstrated higher risk for sex offense recidivism and threat than those identified as Level 2’s or Level 1’s? Or, does it mean that the individuals who actually scored sex offenders using the NY RAG came up with similar scores?

Another troubling issue is the lack of clarity regarding the statistical procedure, if any, that was used to determine the numerical values assigned to each factor. While the New Jersey measure upon which the NY RAG is based, at least provides a rationale and a mathematical formulation for the weighting of their criteria, the NY RAG does not. The statistical rationale for the number of points awarded for each factor, and for the weighting of elements within each factor of the NY RAG appears arbitrary. The NY RAG gives no statistical, mathematical nor other rationale for the point values assigned to the factors identified.

Similarly, the statistical rationale for determining who is at low, medium and high risk is undefined, and seemingly inconsistent with strategies used in other states. Many states currently use an actuarial sex offender risk assessment instrument known as the Static-99, which was developed by the Canadian federal government (Hanson and Thornton, 1999). Among the several available sex offender risk assessment instruments, the Static-99 predicts sex offender recidivism with a measurable degree of accuracy, hence its adoption for use by several states. Many states consider the most dangerous 10 to 20 percent of sex offenders as meriting classification as “Level 3” or highest risk classification. Early research on the STATIC-99 suggests that 12 percent of the sample population fell in to the high risk category. In New York State, the designation of “Level 3” as determined by the NY RAG is given to 54 percent of convicted sex offenders. Unfortunately, the NY RAG gives no rationale for this significant departure from the more commonly accepted risk distributions.

Finally, and perhaps most importantly, the NY RAG is based upon outdated literature. Since the NY RAG’s inception in 1995, seminal research on factors associated with sex offender recidivism has been produced (Hanson & Bussiere, 1998, Hanson and Morton-Bourgon, 2004, Harris and Hanson, 2004). In addition, researchers have produced significant improvement in actuarial measures of sex offense recidivism (i.e., Static-99). These more contemporary and better-validated empirical efforts point to the weaknesses inherent in the NY RAG. Some of the factors of the NY RAG are now known to have no predictive utility whatsoever. Critical elements, which are now known to be among the most potent predictors, are not included.

In support of the view that the NY RAG requires further examination, the State of New York Division of Criminal Justice Services requested assistance from the federal government for further evaluation of the NY RAG. According to the grant proposal Project Abstract, “The NYS Division of Criminal Justice Services is requesting \$223,108 to support a collaborative effort that will. . .(d) strengthen the validity of the classification system employed by the Board of Examiners of Sex Offenders.” This grant proposal, which subsequently was funded by the federal government in 2004, noted that the funds were to be used, in part, for “assessment of the classification model employed by the Board of Examiners of Sex Offenders.” Specifically, the authors noted, “The assessment may identify (1) critical information that is currently not being utilized in the classification of sex offenders and (2) methods of weighing information to provide a more accurate measurement of risk.”

Sex offender service providers may be able to assist the Court by helping judges to understand the limitations of the NY

RAG. The Doe v. Pataki decision mandates that the Court use the NY RAG as a guideline. However, judges are allowed to depart from the risk levels suggested by the NY RAG. Many evaluators around the state are using more widely-accepted measures, ones with an empirically-demonstrated high level of predictive utility (e.g., the Static-99 or Minnesota Sex Offender Screening Tool – Revised version) to supplement the NY RAG.

The purpose of the second part of this article, in the next edition of The Alliance, is to provide the reader with an understanding of the strengths and shortcomings of the NY RAG, toward the goal of having the Courts make more accurate determinations of sex offender risk of recidivism and danger. In short, if the resources necessary to protect the community from high-risk sexually dangerous predators must be applied to 54 percent of all rated sex offenders (i.e., all who are rated Level 3), our current resources are not adequate. On the other hand, if the most dangerous predators can be differentiated from those who pose far lower risk, the community safety resources can be targeted to those who require the greatest degree of supervision and surveillance.

A REVIEW OF NEW YORK RISK ASSESSMENT GUIDELINES FACTORS

A brief review of the individual factors identified in the NY RAG can serve to highlight some of the concerns that they raised.

Category I: Current Offenses

Factor 1: Use of violence

Used [sic] of forcible compulsion . . .	+10	Inflicted physical injury	+15
Armed with dangerous		[sic] instrument.	+30

The way that Factor 1 is constructed would suggest that a sexual perpetrator who physically harmed their victim presents at half the risk for future re-offense and harm than a sex offender who had a weapon in their possession but did not use it in the commission of their sexual crime. There is no convergent evidence in the current literature to support these particular distinctions or the relative weighting of these distinctions in the NY RAG. There is no clear statistical rationale or articulated basis to claim, for example, that an individual armed with a weapon is three times more likely to re-offend and harm their victim than someone who used forcible compulsion and twice as likely to re-offend as someone who inflicted injury against their victim. This weakness in the “test” construction of the NY RAG, (i.e., that there is no clear explanation of how the designers of the measure “weighted” these factors and no statistical basis for doing so indicated) is evident and proves problematic throughout an examination of the measure.

While there is an override noted in the guidelines for Factor 1 which indicates, “if an offender caused serious physical injury or death . . . he is presumptively level 3.” (SORA, 1997, p. 7), there is no operational method for determining what does or does not constitute “serious physical injury”.

It is important to note that extant literature does suggest that being convicted of a non-sexual violent crime at the time of the index offense is related to an increase in an individuals’ long-term risk for recidivism. However, when this factor is utilized in efforts to predict future risk of re-offense, it is done so within the context of an actuarially based assessment measure with examined validity and reliability. In addition, the operational definition of the factor is not

based upon arbitrary distinctions among the type of violent behaviors to be included but relies on distinction already found in the law.

Factor 2: Sexual Contact with the victim

- Contact over clothing +5
- Contact under clothing. +10
- Sexual intercourse, deviate intercourse or aggravated sexual abuse. . . . +25

The operational definition of “sexual contact over and under the clothing” is not clearly articulated in the guidelines regarding Factor 2. As written, one could possibly interpret tickling or changing a diaper as sexual contact. Even more problematic is the fact that Factor 2 has no current empirical basis for being correlated with an increased risk for sexual offense recidivism in the literature in the field. As a matter of note, many of the factors identified in these guidelines are based upon dated literature, ranging from as early as 1976 to 1997. These references are included, but not directly cited relative to the foundation for different factors found in the NY RAG, and they pre-date an important and seminal piece of research completed by Hanson and Bussiere in 1998. (see: *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*) The results of the Hanson & Bussiere research, which is based upon a meta-analysis of 61 studies which examined a total of 23,393 sexual offenders, fails to suggest that touching a victim over or under their clothing has any significant relationship to an individual’s risk for sexual offense recidivism.

Factor 3: Number of victims

- Two. +20
- Three. +30

The way Factor 3 is presented suggests only that having three victims during the index offense is more strongly predictive of sexual offense recidivism and threat to the community than having two victims. Current literature does not support this factor as highly salient in determining long-term risk for sexual re-offense. Rather, the number of charges and/or convictions for sexual crimes *prior* to the index offense has proven to be more significantly associated with sexual re-offending (Hanson and Thornton, 1999). In addition, the problem of collapsing the two distinct purposes of the NY RAG, to determine risk of re-offense as well as risk of threat to the community, is highlighted here.

As, independently, Factor 3 suggests that an exhibitionist, with high numbers of victims secondary to the high frequency of their behavior but low risk of actual threat, would receive 30 points in this category while a sex offender who had committed two contact sexual offenses against children would only receive 20 points. And the individual who has committed his first sexual, sadistic murder against a child would receive 0 points in this category. In addition, more current studies suggest that other, more relevant victim characteristics relative to victims of both index and past sexual crimes, such as victim gender and the relationship of the victim to the perpetrator, have been found to be more salient predictors of risk for sexual re-offense than the number of victims resulting from the index offense alone.

Factor 4: Duration of offense conduct with victim

- Continuing course of sexual misconduct +20

The guidelines indicate that Factor 4 is designed to identify a particular type of pedophile who engages in sexual offending behavior repeatedly with the same victim. First, the NY RAG fails to identify the literature in the field that supports the notion that a continuing course of sexual misconduct is related to increased risk for sexual re-offense. In the current literature, this is not identified as a factor of note. Another problem is that, although it offers no statistical method for inclusion or exclusion of factors, the NYRAG is conceptually understood as attempting to capture sex offense recidivism in general. It is not reported to be designed to capture the re-offense risk of a specific type of pedophile nor of every subtype of pedophile identified in the literature. Knight, and Prentky (1989), for instance, have empirically identified twenty-four different types of pedophiles. As such, if the NYRAG is attempting to account for the re-offense risk of one specific type, it should clarify its purpose or should account for the risk of all types. In addition, Factor 4 could serve to erroneously identify an incest offender, who has a limited victim pool and often a single victim, as a higher risk for sexual re-offense and harm to the community over a serial pedophile who perpetrates singular sexual crimes against numerous unrelated, stranger victims. This does not appear to be accurate according to the current literature.

Factor 5: Age of Victim

- 11-16 +20
- 10 or less, or 63 or more +30

Factor 5 as written suggests that if someone is serially raping women between the ages of 17 and 63, they either are not at risk for sexual re-offense or can't earn points for their behavior on this measure. While perpetrating against child victims is associated with risk for sexual offense recidivism, as noted earlier, there are other salient victim characteristics identified that serve to inform risk prediction. In addition, the literature does not support the implication in Factor 5 that sex offenders who target children under the age of 10 are equally at risk of sexual re-offense recidivism as those who target elders, although, understandably, threat to the community might be viewed as equivocal secondary to the vulnerable nature of both populations.

Factor 6: Other victim characteristics

- Victim suffered from mental defect or incapacity or physical incapacity. +20

The victim characteristic of mental and/or physical vulnerability does not appear to be highly correlated with risk for sexual offense recidivism. As well, not having offended against a disabled individual does not appear to function as any type of protective or mediating variable in potential for sexual offense. Again, this factor appears related to the possible threat of harm to the community but once again it is artificially collapsed here with risk for re-offense here. As noted previously, other victim characteristics appear to be more salient indicators of future risk for sexual re-offense.

Factor 7: Relationship with victim

- Stranger established for purpose of victimizing or professional relationship. +20

Factor 7 artificially collapses two distinct categories. In so doing, it appears to mix apples and oranges but only allows for one score. Research suggests that individuals who target stranger victims present at high risk for sexual re-offense. There is no current data to specifically suggest, however, that those who seek to establish a relationship with their victim that arises “in the context of a professional relationship between the offender and the victim,” (SORA, 1997, p.

12) represent equal degree of risk for recidivism. This second category represents an effort to capture those individuals who seek and hold professional positions of authority over children or others, (i.e. priests, baseball coach, therapist, teacher, dentist, doctor, etc.) with the intent of using their professional relationship to sexually victimize individuals. Combining both of these types of perpetrators into one category is problematic because they may, in fact, each represent different levels of risk. The NY RAG does not appear to be designed to address the risk presented by this, or other, distinctions among sex offender types. However, failure, again, to appreciate the distinction between these two specific types of offenders can serve to artificially raise an individual's risk score and/or may exclude other types of offenders that need to be considered.

Category II: Criminal History

Factor 8: Age at first act of sexual misconduct

20 or less +10

Current research indicates that early onset of sexual offending behavior is correlated with sexual offense recidivism. However, recent literature also suggests that individuals between the ages of 18 and 24.99 represent an increased risk for sexual re-offense. The NYRAG does not account for the risk associated with those sex offenders between the ages of 20.01 and 24.99, nor does it provide a theoretical or statistical rationale for not doing so.

Factor 9: Number and nature of prior crimes

Prior hx/no sex crimes or felonies . . . +5
 Prior hx/non-violent felony. +15
 Prior violent felony or misdemeanor sex crime or endangering welfare
 of a child +30

Factor 9 attempts to capture the correlation between past sexual offenses and other non-sexual crimes and their relationship to risk for sexual re-offense.

The problem comes when violent crime and sexual crime are combined within the same factor when in fact they represent two distinct factors that should be considered. Sex offenders differ from those who commit violent crimes in important ways and this factor again erroneously makes them equivalent. A history of a sexual crime(s) should be considered independent of an individual's history of violent, non-sexual crimes and the NY RAG does not offer any statistical or theoretical basis for combining these factors. Both, however, should be considered in attempts to determine an individuals' risk for sexually violent re-offense.

Factor 10: Recency of prior offense

Less than 3 years +10

The recency of an offender's prior crime within three years has not emerged as a relevant factor for consideration of risk for sexual re-offense in the current literature. In addition, Factor 10, as do many of the factors, lacks clear operational defining, collapses non-sexual and sexual crimes into one factor and fails to capture the temporal construct of criminal recidivism and it's relationship to sexual re-offense.

Factor 11: Drug or alcohol abuse

History of abuse +15

Having a history of substance abuse problems does not appear to be highly correlated with risk for sexual re-offense based on the current literature in the field. However, substance use itself can be associated with an increase in acute risk for sexual re-offense. This, however, represents a dynamic or changeable variable that should be considered in managing sexual offender recidivism.

III. Post-Offense Behavior

This category involves an assessment of an individual’s conduct while in custody. The guidelines do not offer much in the way of explanation or operational definitions of this section. The guidelines do indicate that the post-offense behavior factors are prospective factors and that they are not weighted as heavily as other factors. It remains unclear, however, what methodology was used to determine the appropriate “weight” of any of the factors in the guidelines.

Factor 12: Acceptance of responsibility

Not accepted responsibility +10

Not accepted responsibility/refused or expelled from treatment. +15
Contrary to popular belief, there is no evidence that denial of responsibility for one’s sexual offense is correlated with sexual re-offense. In addition, the second score on this factor artificially equalizes an individual who has not accepted responsibility for his offense with a person who has refused (perhaps for legal reasons) or who has been expelled from treatment. First, accepting responsibility for a sexual offense may or may not be related to treatment participation and does not appear to be so associated in the literature. Second, according to the information available in the guidelines, the committee who developed these guidelines decided not to include factors related to participating in sex offender treatment in spite of the statute directive to do so. This second score, while again artificially collapsing taking responsibility for a sexual offense with treatment participation, penalizes individuals for not participating in treatment while the NY RAG, as a whole, fails to recognize participation in treatment as a positive risk mediator.

Factor 13: Conduct while confined/supervised

Unsatisfactory. +10

Unsatisfactory with sexual misconduct +20

The current literature does suggest that offender behavior while confined can provide useful information about an individual’s risk for sexual re-offense. The problem with this NYRAG factor, as with so many others, is the failure to effectively operationally define “unsatisfactory” and the parameters of this factor.

IV. Release Environment

The guidelines do not offer any general or more specific operational explanations of the factors in this category. It is hypothesized that the aim is to assess dynamic or variable factors associated with an individuals’ lifestyle following their time-served for a sexual offense. This category also has to be scored prospectively.

Factor 14: Supervision

Release with specialized supervision +0

Release with supervision +5 Release without supervision +10

This factor appears to be based upon faulty logic. Individuals who are released in to specialized, high intensity sex offender probation programs are largely those who are considered to be at high risk of sexual re-offense. Yet they are scored at 0 on this factor. In turn, those who may require less supervision, i.e., standard supervision or less, perhaps because of the nature of their crimes, are penalized for being at less risk to re-offend and at lower threat to the community. Certainly a high-risk offender who has no probation or parole to follow him upon release may present at high risk for sexual re-offense.. The way this factor is constructed, however, does not allow for the consideration of those who are at less risk and who may actually require less supervision as a result and unnecessarily penalizes them

Factor 15: Living/ employment situation

Living or employment situation inappropriate +10

Factor 15 attempts to capture the idea that an offender’s increase access to victims, either through the work or living environment needs to be accounted for in consideration of risk for sexual re-offense. This does appear to be associated with recidivism risk in the current literature. Once, again, however, the NY RAG offers no statistical basis for inclusion of this factor in this measure or for its relative weight of 10 points.

Conclusion

Although defined as an “objective assessment instrument,” there is no indication that the NY RAG has been developed based on standard best practices of test construction nor does it appear to have been scientifically validated or demonstrated to be reliable in any form. As such, there is no way to confirm if the factors identified, operationalized, grouped together and used in these guidelines are associated with an accurate assessment of sex offender re-offense and potential for harm or threat to the community in a statistically significant way. The stated, but not demonstrated, “objective” nature of these guidelines becomes further compromised when, in an effort to consider additional relevant factors associated with sexual re-offense and harm, the directive to eschew *per se* rules and “assess risk on the basis of all pertinent factors” (SORA, 1997, p.2) is applied in an overly enthusiastic and broad manner.